IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21314
TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION, et al,
Petitioners

v.

FEDERAL POWER COMMISSION
Respondent

JOINT AND SEVERAL BRIEF OF PETITIONERS TEXAS INDEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIATION, WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION AND PERMIAN BASIN PETROLEUM ASSOCIATION

JOHN DAVENPORT
902 International Life Building
Austin, Texas 78701
Attorney for above Petitioners

December 12, 1966

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

STATEMENT OF JURISDICTION

Petitioners herein have previously filed a Petition for Review of Federal Power Commission (Commission) Opinion No. 495, and accompanying orders thereto, issued June 15, 1966, in F.P.C. Docket Nos. CP65-213, CP65-214, and CP65-215, review of the Commission Order Denying Reconsideration, Waiver of the Commission's Rules and Making Determination of the Question of "Extraordinary Circumstances" issued December 17, 1965 in the same proceedings, and review of the Commission's Order Denying Application for Rehearing issued August 4, 1966, in the same proceedings under Section 19(b) of the Natural Gas Act. (Title 15 U.S.C. 717-717w) In accordance with the provisions of that Act a review of this order is proper in this Court, because it is a "circuit wherein the natural gas company to which the order relates is located or has its principal place of business." Petitioners timely filed an application for rehearing of Opinion 495 and accompanying orders by the Federal Power Commission, and after denial thereof, a Petition for Review was filed in this Court within sixty days of the date Petitioners' application was denied, in accordance with the provisions of Section 19 (b) of the Act.

I.

STATEMENT OF THE CASE

By the Opinions and Orders of which review is here sought, the Federal Power Commission issued a certificate authorizing the construction of additional facilities and the importation of 100 million cubic feet per day of Canadian

natural gas commencing on November 1, 1966, and an additional 100 million cubic feet per day commencing on November 1, 1967, for transportation and sale by Pacific Gas Transmission Company (PGT) to the Pacific Gas and Electric Company (PG&E) for resale in Northern California. The Opinions and Orders were issued purportedly under the authorization of Subsections (c) and (e) of Section 7 of the Natural Gas Act, (52 Stat. 825; 15 U.S.C. Sect. §717 (f)), and the authorized importation constitutes an addition to an original (1960) authorization of PGT to deliver 415 million cubic feet of Canadian natural gas per day to PG&E. (24 FPC 134, August 5, 1960)

II.

Petitioners are trade associations in Texas with a combined membership of approximately 7500 independent producers and royalty owners of crude oil and natural gas. Since many hundreds of members of these associations in West Texas engage in sales of natural gas subject to the jurisdiction of the Commission, under the Natural Gas Act, and since most of the jurisdictional natural gas in West Texas is sold into the California markets, Petitioners sought to intervene in the proceeding below; and having demonstrated to the Commission below their interest in these proceedings, were granted leave to intervene by the Commission Order dated May 25, 1965. (Tr. 4374) These Petitioners participated actively in all proceedings below before the hearing examiner. (Tr. 132-1769)

III.

A pre-hearing conference was held on July 22, 1965, (Tr. 1) pursuant to the amended order of the Commission issued on June 18, 1965, (30 F.R. 8286). The hearing it-

self began on September 15, 1965, and concluded on September 29, 1965. (Tr. 132-1769)

IV.

On the opening day of the hearing, the hearing examiner sustained a Motion to Exclude Testimony of Bob R. Harris, an employee of the Texas Railroad Commission, (Tr. 136) and Arlan Edgar (Tr. 137), both of which witnesses would have presented evidence on availability of supplies of natural gas from portions of West Texas which are connected by existing interstate pipeline to the proposed California markets.

V.

The hearing examiner also sustained a Motion to Exclude Testimony by reference and supporting exhibits of Barry Hunsaker, an employee of El Paso Natural Gas Company. (Tr. 140)

VI.

The State of Texas, supported by these producer associations then sought issuance of a subpoena duces tecum for the witness Barry Hunsaker, but this request for a subpoena was denied by the hearing examiner. (Tr. 430) The hearing examiner denied the application for a subpoena duces tecum for this witness, even though informed by Texas and other parties that this witness was essential to establish their contention that the gas available in Texas could be more cheaply and dependably delivered in California than the gas covered by PGT's application. (Tr. 417) The State of Texas repeatedly emphasized that additional information was needed from Mr. Hunsaker, and that since he is not a witness nor an employee of the State of Texas

but General Manager of the pipeline division of El Paso Natural Gas Company, a subpoena would be required to obtain his essential testimony. (Tr. 413)

VII.

The State of Texas, joined by these Petitioners, then sought to appeal the refusal of the hearing examiner to issue a subpoena for witness Hunsaker to the Commission, but the Commission Secretary, after accepting the filings (Tr. 4631) later returned them with his (the *Secretary's*) ruling that they did not "recite pressing reasons for review of the Examiner's ruling by the Commission." (Tr. 4733) On Motion for Reconsideration (Tr. 4743) the Commission denied this appeal in its order issued December 17, 1965. (Tr. 4890)

VIII.

The hearing examiner issued his initial decision on September 17, 1966 approving issuance of a certificate authorizing the transportation and sale of additional quantities of Canadian natural gas from PGT to PG&E and authorizing importation of this gas from Canada. (Tr. 4902-4929)

IX.

Exceptions to the initial decision were filed by these Petitioners and others on March 17, 1966. (Tr. 4948-4963)

X.

The Commission issued its Opinion No. 495 dated June 15, 1966 authorizing the importation of additional quantities of gas requested in the PGT application. (TR 5257-5263)

XI.

These Petitioners filed applications for Rehearing of Opinion No. 495 and the Commission's Orders on July 11, 1966. (Tr. 5278-5284)

PRELIMINARY STATEMENT

Throughout these proceedings, the State of Texas (Petitioner in Cause No. 21313); the Texas producer associations (Petitioners herein); and the California producing group (Petitioners in No. 21310) have been allied in attempting to present evidence that would establish

(1) There is no present need in Northern California for the huge volumes of gas sought by the PGT application, and

(2) Alternative sources could supply the existing need of Northern California consumers more dependably and at a cheaper price.

To avoid burdening the Court with duplicating arguments, these Petitioners hereby adopt the briefs herein submitted by the State of Texas in Cause No. 21313 and by the California producing associations in Cause No. 21310, and will confine this brief to those specific points considered of most importance to the Petitioners.

These Petitioners would particularly urge the Court to carefully read both the hearing examiner's decision (Tr. 4903-4928) and the Commission's Opinion No. 495 (Tr. 5257-5263), as these Petitioners would submit that the inherent deficiencies in the PGT application are revealed therein.

SPECIFICATION OF POINTS RELIED UPON

1. The Commission failed to meet its statutory respon-

sibility to determine the best, cheapest, and most dependable source of natural gas and thereby to protect the interest of the public.

2. The Commission erroneously found that a market exists for the proposed additional sales by Pacific Gas Transmission to Pacific Gas and Electric, contrary to the evidence of record.

3. The Commission erred in granting the application for certification, based primarily on the utilization of the present Pacific Gas Transmission pipeline facilities to their fullest capacity.

ARGUMENT
POINT NO. 1

THE COMMISSION FAILED TO MEET ITS STATUTORY RESPONSIBILITY TO DETERMINE THE BEST, CHEAPEST, AND MOST DEPENDABLE SOURCE OF NATURAL GAS AND THEREBY TO PROTECT THE INTEREST OF THE PUBLIC.

These Petitioners throughout these proceedings sought to present evidence relating to a cheaper and more dependable supply of natural gas than that proposed to be imported under the Pacific Gas Transmission application. The hearing examiner struck the evidence of Arlan Edgar, witness for the Permian Basin Petroleum Association and Bob R. Harris, witness for the State of Texas, both of whom would have shown the availability of ample gas supplies from the West Texas area. The testimony of witness Hunsaker, sought by subpoena, was denied by the hearing examiner and specifically affirmed by the Commission in its order of December 17, 1965. This excluded testimony would have established that large new additional supplies of gas were (and are) available from West Texas-New Mexico wells and can be delivered more cheaply than the Pacific Gas Transmission gas to the Northern California area.

This denial of the admission of this evidence, clearly relevant to this hearing and vital to support Petitioners' position, was a denial of due process guaranteed by the Constitution of the United States, and an abdication by the Commission of its statutory responsibilities.

The basis of the exclusion of testimony of witnesses Edgar, Harris, and Hunsaker by the hearing examiner was that it was not relevant or material since El Paso had made no competing application in this proceeding. (Tr. 136, 138, 140) The hearing examiner stated "it does not support or is it related to any application to dedicate any specific Texas gas for sale and transportation in interstate commerce." (Tr. 136)

The ruling of the hearing examiner in excluding this testimony is clearly contrary to the holdings and consistent rulings of the Circuit Courts of Appeals. In *City of Pittsburg v. Federal Power Commission*, 237 F. 2d 741 (D.C. Cir. 1956), the Court said:

> "The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the (original) proposal."

Similarly in *Scenic Hudson Preservation Conference, et al v. Federal Power Commission*, 354 F. 2d 608 (Second Cir. 1965), the Court held that an alternative or competing application need not be fully developed by the parties, but that the Commission itself had an affirmative duty to inquire into all possible alternatives. The Court stated its view of the Commission's role as the representative of the public interest as follows:

". . . This role does not permit it to act as an umpire

> blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. . .
>
> "The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts."

The Commission itself has on occasion recognized this responsibility, and discharged it. (See *El Paso Natural Gas Company*, 30 FPC 77, the 1963 *Rocksprings* proceeding.)

In the *Scenic Hudson* case the Court relied heavily on both the *City of Pittsburgh* case supra, and *Michigan Consolidated Gas Company v. FPC*, 283 F. 2d 204, Cert. denied, 364 U.S. 913 (1960). In the *Michigan Consolidated* case, the Court recognized that Michigan Consolidated had presented an alternative proposal too late to comply with the statutory requirement; however, the Court stated

> "(t)these matters (set forth in Michigan Consolidated's settlement proposal), on their face reflected the basis for an alternative to total abandonment, so apparently in the public interest, that their consideration at some point in the proceedings was indispensable to the validity of any public interest determination in support of total abandonment. In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding."

In light of the holdings of these Courts, the hearing examiner was clearly in error in denying these Petitioners and others the opportunity to present the prepared testimony of witness Arlan Edgar and witness Bob Harris and in denying the application for issuance of subpoena duces tecum for the witness Barry Hunsaker. The testimony of these witnesses would have established the availability of an alternative and fully adequate source of natural gas at a

delivered California price much cheaper than that covered by the application of Pacific Gas Transmission.

In contrast to the gas available through existing Texas-California lines, the Canadian gas sought to be imported is not subject to Commission regulation as to price at the wellhead. (Tr. 434, 435, 436, 5259)

The Commission staff strongly urged that conditions be attached to the granting of this certificate to insure that at least some of the many indefinite pricing provisions be eliminated, but this was denied by the Commission. (Tr. 5258, 5259)

The primary disability of the Canadian supply sought to be imported by the PGT application is its total lack of a firm and stable price. Cross examination of Applicant's own witness Blair disclosed that at least 86 percent of the gas supply *of both the original and the enlarged facilities* is subject to an unlimited renegotiation and redetermination clause effective July 1, 1968. (Tr. 441-450) These contracts provide that in the event of dispute over the renegotiation price in 1968 a ruling by a three man board of arbitration will be final and binding on all parties. (Tr. 471-472)

Witness Malcolm Abel testified below that

> "it is my conviction, based on my experience as a producer and seller of gas in Alberta and in the United States, that the renegotiation of the A and B contracts (which constitute 86 percent of the daily contract volumes of this Project) will inevitably result in a higher price than that specified in the periodic escalation schedules, and will in turn result in an increase in other contract prices where those contracts have an average weighted price determination provision," and "these Canadian contracts are the most generous interstate or interprovincial producer contracts that I have seen

throughout my experience in the business." (Tr. 1547)

The hearing examiner discussed the indefinite escalation clauses contained in almost all of the Canadian production contracts in his decision (Tr. 4912, 4913, 4914), and stated (Tr. 4913)

> "Since the issuance of this order (for the original construction) at 24 FPC 134, the Commission has determined that indefinite pricing escalation provisions of certain types in domestic producer contracts for the sale of natural gas in interstate commerce are contrary to the public interest. *Pure Oil Co.*, 25 FPC 383, *affirmed*, 299 F. 2d 370; See FPC Order No. 174-B, 13 FPC 1576; FPC Order No. 232, 25 FPC 379, as amended by Order No. 232A, 25 FPC 609; FPC Order No. 242, 27 FPC 339, and Section 154.91, *et seq.* of the Commission's Regulations Under the Natural Gas Act; also *FPC* v. *Texaco Inc.*, 377 U.S. 33; *Atlantic Refining* Co., 32 FPC 17."

The hearing examiner specifically found that the Canadian subsidiary of PGT is now using the Form D contract which he stated contains no indefinite escalation clauses (Tr. 4914) but this finding is completely in error in the light of the sworn testimony of applicant's witness Blair, *who admitted that some of the new Type D contracts have renegotiation clauses.* (Tr. 449, 450). His precise testimony on this point is as follows:

> "Q. . . . you have the renegotiation provision in contracts A, B and D. This contract provision provides for renegotiation on July 1st, 1968, and every 5 years, is that correct?
>
> A. Yes.
>
> Q. Certain of the contracts in the Wilson Field, I believe in contract D?
>
> A. Yes.

Q. They have the same type of renegotiation or redetermination?

A. Yes, I said that I didn't remember whether in Wilson Creek we advanced that first year to 1973, that is the first year for renegotiation. My memory doesn't support me in this, whether we did or not, recognizing that 1968 was pretty close to start such a renegotiation. But it does contain a provision for renegotiation each 5 years thereafter."

Both witness Abel (Tr. 4912) and the hearing examiner (Tr. 4913) termed the 86 percent of the Canadian contracts as "open-ended."

These petitioners desired to incorporate in the record actual evidence establishing that the domestic supply of natural gas was cheaper than that proposed in this application. Though this opportunity was denied, Applicant's witness Frank strongly indicated (if he did not actually admit) that the domestic gas supply available from El Paso Natural Gas Company was actually cheaper than the Canadian gas supply. His precise testimony is as follows (Tr. 1221);

"Q. What figure did you use for that?

A. I used 22 cents per Mcf and approximately 18 cents per Mcf for Canadian, 22 cents for El Paso.

Q. Are those border prices or what prices are they?

A. 22 cents is approximately the border price at the California border.

Q. At Topock? (El Paso entry point)

A. At Topock, right; and the 19 cents are approximately the purchase price of the gas in the field.

Q. And the 18 cent price contains no transportation cost from the field?

A. No, sir.

Q. What is the distance from the Alberta fields to the load center at Antiock, sir, approximately?

A. Over a thousand miles." (Tr. 1221).

The above sworn testimony, given by Applicant's own witnesses under cross-examination, tends to confirm the fact that the El Paso (Texas) gas is cheaper than gas proposed to be imported under this application.

Not only do the Canadian contracts presently exceed the price of available domestic gas, but unlimited renegotiation and redetermination clauses in the Canadian contracts will trigger indefinite escalation prohibited by the Commission for United States gas. Contract types A and B provide a weighted-average price redetermination starting in 1968 (Tr. 453), and the company has a "postage stamp policy" of paying the same price for all gas of similar quality. (Tr. 253 and 469) Thus, with contract provisions for weighted average price escalation and a company policy of paying the same price for similar gas, when contracts of Type A, B, or D escalate by the 1968 renegotiation, all other Canadian producers can secure the same price by virtue of these factors.

Since the pipelines between the wellhead and consumer are on a cost-of-service basis (Tr. 4913), the higher wellhead prices will pyramid California consumer costs.

While the base price of Canadian gas on July 1, 1967, will be 17 Canadian cents per Mcf at the wellhead (Tr. 449) contract provisions for Btu premiums could result in payment of field prices as high as 19.13 Canadian cents per Mcf in 1967, even before the 1968 renegotiation (Tr. 449).

In approving the importation of this Canadian gas with its generous and indefinite wellhead contracts, the Commission has discriminated against domestic U.S. gas pro-

ducers, whom it will not permit to utilize similar contract provisions.

The Commission must insure that domestic consumers have the same degree of protection on the price of all gas which they purchase from interstate sources. *FPC v. Hope Natural Gas Company*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333. (1944); *Atlantic Refining Company, et al, v. Public Service Company of the State of New York*, 320 U.S. 378, 79 S, Ct. 1246, 3 L. Ed. 2d 1312 (1959). It has obviously failed to do so in Opinion No. 495.

Since the Commission erred in granting this certificate on an incomplete record, and did not determine the best, cheapest and most dependable source of natural gas for Northern California consumers, this Honorable Court should set aside the action of the Commission and remand this proceeding for a determination by the Commission of the most feasible and economical of possible alternative sources.

POINT NO. 2

THE COMMISSION ERRONEOUSLY FOUND THAT A MARKET EXISTS FOR THE PROPOSED ADDITIONAL SALES BY PACIFIC GAS TRANSMISSION TO PACIFIC GAS AND ELECTRIC, CONTRARY TO THE EVIDENCE OF RECORD

In a desperate bid to secure Federal Power Commission approval before its generous indefinite producer contract terms take full effect, the Applicant attempted to justify a need for a full-line volume of Canadian gas at this time. Applicant fell far short of establishing this point. For example, Applicant's own witness showed that PG&E interruptible gas customers have not been cut off at any time in the last two years (Tr. 1188, 1190), and this witness

estimated that these interruptible customers will secure 100 percent of their needs in 1967, 1968 and 1969, and 98 percent in 1970 (Tr. 1191), without the increased Canadian volumes.

More importantly, Applicant's witness Frank admitted that there will be no deficiency in PG&E supplies before the winter of 1968-69 (Tr. 1162), and if California-produced gas supplies only continue at their present rate there will be no deficiency in PG&E needs before the winter of 1970-71 (Tr. 1169).

As pointed out in voluminous evidence by the California gas producers, the refusal of PG&E to estimate any future California gas discoveries led to a ridiculously low estimate of California production (Tr. 1358, 1497).

The failure of PG&E to attempt to obtain additional supplies from El Paso Natural Gas Company was emphasized by the fact that PG&E Topock-Milpitas twin 34-inch lines have only three compressors along the entire 500 mile length (Tr. 1204-1205). Exhibit 46 shows that although PG&E has a regular El Paso contract for 1,025,000 Mcf per day (at 14.9 psia), it has received deliveries of over 100,000 Mcf per day more than this contract amount, even with the meager compression facilities on the Topock-Milpitas lines.

Similarly, Applicant's own witness admitted PG&E has received as high as 450,000 Mcf per day from the existing Canadian line (Tr. 1154), can obtain an additional 54,000 Mcf per day from El Paso and Pacific Lighting (Tr. 1159), and can receive an excess of 713,000 Mcf per day from California wells on a peak day as contrasted to an average day (Tr. 1160).

In view of the failure of Applicant to establish a need for the additional volumes of Canadian natural gas, the

Commission erred in granting the certificate in Opinion No. 495, and this Honorable Court should set aside such Opinion and accompanying orders and remand this cause to the Commission for a proper determination of this point.

POINT NO. 3

THE COMMISSION ERRED IN GRANTING THE APPLICATION FOR CERTIFICATION, BASED PRIMARILY ON THE UTILIZATION OF THE PRESENT PACIFIC GAS TRANSMISSION PIPELINE FACILITIES TO THEIR FULLEST CAPACITY

Both the hearing examiner and the Commission itself seemed persuaded to grant the PGT application by the fact that the present PGT line from Canada is being utilized at less than capacity.

The Commission stated in Opinion No. 495 (Tr. 5259):

> "We think that the exceptions to the examiner's initial decision must be denied and that the certificates applied for should be issued to the applicant. We are concerned here with already existing pipeline facilities which are not yet utilized to their fullest capacity. The increased use of the existing pipeline facilities will reduce the unit cost of the gas supplied to California and will also reduce the unit cost of transportation of gas transported for El Paso and destined for the consumers in Washington, Oregon and Idaho. To refuse to issue certificates authorizing the importation, transportation, and sale of this additional gas would mean that some of the capacity of presently existing facilities would remain unused with resultant higher costs to the consumers in four states."

The hearing examiner stated (Tr. 4903):

> "The various regulatory agencies recognized, when they authorized the construction and operation of this 36-inch line, that it was oversized for the throughput of the initially certified volumes of 415,000 Mcf per day. However, PGT there indicated that future authorizations would be sought to import additional volumes of natural gas to utilize the full capacity of the line."

Both the Commission and the hearing examiner emphasized that utilization of the existing line for additional volumes should lower the incremental costs of natural gas to California consumers, but as pointed out in Point No. 1 above, this reduction is illusory, due to the upcoming renegotiation and escalation provisions in the producer contracts.

Since the Commission erred in granting the application for certification based primarily on the utilization of the present PGT pipeline facilities to their fullest capacity, this Honorable Court should set aside Opinion No. 495 and its accompanying orders, and remand this cause to the Commission for a determination of the question of the cheapest and best possible source of natural gas for use by Northern California consumers.

CONCLUSION

It is submitted that Respondent has not met its obligation under the Natural Gas Act to determine if this application is required by the present and future public convenience and necessity.

These Petitioners respectfully submit that this Honorable Court should set aside Commission Opinion No. 495 and its accompanying orders, particularly including the order of December 17, 1965, and remand this matter to the Commission with instructions requiring admission of

the evidence previously excluded and to determine if the facilities and inportation proposed in such application are in the public interest and required by the present and future public convenience and necessity.

Respectfully submitted,

TEXAS INDEPENDENT PRODUCERS & ROYALTY OWNERS ASSOCIATION

WEST CENTRAL TEXAS OIL AND GAS ASSOCIATION

PERMIAN BASIN PETROLEUM ASSOCIATION

By John Davenport
JOHN DAVENPORT
Attorney for above Petitioners
902 International Life Building
Austin, Texas 78701

December 12,1966

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John Davenport
JOHN DAVENPORT

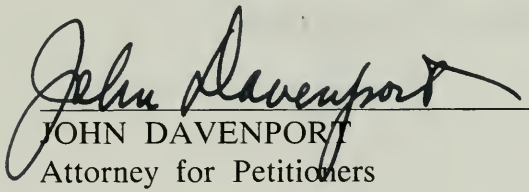
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing upon the following party:

Howard E. Wahrenbrock,
Solicitor
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

and all parties to the proceeding.

Dated at Austin, Texas this the 8th day of December, 1966.



JOHN DAVENPORT
Attorney for Petitioners